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In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 471.

A. B. GOCHENOUR, MEYER ABRAMS,
HARRY J. MYERSON
and
FANNIE B. STERN,
Executrix of the Estate of
Joseph L. Stern, Deceased,
Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY,
FREDERICK L. LECKIE, JOSEPH G. FOGG,
and I. WALTER SHARP,
Respondents.

On Petition for Writ of Certiorari to
The United States Circuit Court of Appeals
For the Sixth Circuit.

BRIEF OF RESPONDENTS, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP, IN OPPOSITION TO THE PETITION.

Frederick L. Leckie,
Joseph G. Fogg,
I. Walter Sharp,
Counsel for Respondents.

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and I. WALTER SHARP,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP, IN OPPOSITION TO THE PETITION.

QUESTIONS PRESENTED.

The questions resolved by the Special Master and the District Court were,—

1—What compensation should be allowed to Messrs. Frederick L. Leckie, Joseph G. Fogg and I. Walter Sharp, (Respondents, here) for their services as special counsel appointed by the Court, in the prosecution of a cause of action in favor of the Subsidiary

Debtor which resulted in the recovery of $550,000.00 for the estate?

2—Did the petitioners, counsel for certain creditors of Subsidiary Debtor, contribute towards that recovery?

3—If petitioners did furnish any such contribution, what, if any, compensation therefor should be awarded to them?

The issue before the Circuit Court of Appeals was, and here is,—

"Shall the findings of the Master and Court on these factual issues be disturbed"?

THE ANSWERS GIVEN BY THE LOWER COURTS.

Three tribunals, the Special Master, the District Court and the Circuit Court of Appeals have agreed,—

1—Upon the amount of compensation that should be awarded the Court's counsel, the respondents here; and

2—That the petitioners, counsel for creditors, were not entitled to compensation.

The Circuit Court of Appeals, while affirming these findings, also considered that the petitioners, as being in a sense, volunteers, would not be entitled to compensation even if their services had been beneficial to the estate (R. 109).*

THE NATURE OF THE PROCEEDINGS AND THE ORIGINS OF THE CONTROVERSY.

The controversy now before this Court arose out of certain corporate reorganization proceedings under Section 77B of the Bankruptcy Act, pending since October,

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* Printed Transcript of Record filed herein by petitioners, page 109.

1936, in the District Court for the Northern District of Ohio, Eastern Division, wherein Van Sweringen Corporation has been designated as "Debtor," and The Cleveland Terminals Building Company as "Subsidiary Debtor." The respondents, Frederick L. Leckie and Joseph G. Fogg, were appointed Trustees of the Debtor on February 9, 1937. The Subsidiary Debtor was allowed to remain in possession, but on February 8, 1938, the same respondents were appointed as its Supervisors. The order appointing them reads, in part, as follows (R. 6):

> "NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, until further order of this Court, the Subsidiary Debtor shall continue in possession of its property and shall continue the operation of its business; provided, however, that such possession and operation shall be expressly subject to the supervision of Frederick L. Leckie and Joseph G. Fogg, heretofore appointed Trustees of Van Sweringen Corporation, and they are hereby authorized and directed to supervise and direct the management of the properties and the operation of the business of the Subsidiary Debtor as the same shall be conducted by its officers, employees and agents, *and to perform such legal services as may be proper in connection therewith*, provided, however, that said Frederick L. Leckie and Joseph G. Fogg shall have no duty to exercise any supervision and control over the action which the Subsidiary Debtor may take with respect to claims now pending in this proceeding (obviously claims *against* the Subsidiary Debtor), or with respect to any Plan of Reorganization herein."

Acting under this order, Messrs. Leckie and Fogg, during all of the period involved herein, functioned as supervisors of the Subsidiary Debtor's business, and as attorneys for themselves as such supervisors, and for the Subsidiary Debtor, in respect to all matters wherein *Special Counsel* were *not appointed* by the Court.

The respondent I. Walter Sharp has been special counsel appointed by the Court for the Subsidiary Debtor in various matters since July, 1937.

The petitioners, Meyer Abrams and associate attorneys now before this Court, have been functioning throughout the proceedings as attorneys for a group of creditors. They have been pertinaciously and ubiquitously active. Some results beneficial to the estate were thus achieved. For those they have already been compensated, having asked for $172,000.00 and having received $18,000.00. See *Abrams et al. v. Cleveland Terminals Co.* (May 31, 1943), 136 F. (2d) 537, certiorari denied 320 U. S. 788.

The case now at bar involves the awarding of compensation for services culminating in the successful prosecution on behalf of the Subsidiary Debtor of a plenary action in the District Court of the United States for the Southern District of Indiana, Indianapolis Division (R. 3) against George A. Ball and the Ball Foundation, which resulted in the obtaining of $550,000.00 for the estate of the Subsidiary Debtor which fund is now held in bank in special account. The respondents Leckie, Fogg and Sharp were the special counsel appointed by the Court who alone prosecuted the action and effected the recovery. That fact petitioners do not deny. It is their claim (R. pages 19 *et seq.*) that they discovered the facts and evolved the theories upon which the recovery was had and that they inspired, prompted or forced the institution of the action which resulted in the recovery, all of which respondents deny.

A terse summary of the cause of action thus prosecuted is found in the respondents' petition for compensation (R. pages 1 to 19)*. We quote briefly:

> "Your applicants state that the claims of Subsidiary Debtor in connection with which applicants rendered services covered by this application, were unliquidated and of an equitable nature involving long-

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* This is not printed in full. Most of the itemized schedule of services is omitted as well as the exhibits. Exhibit D to this petition was a copy of the complaint filed. (See R. 4.)

concealed breaches of fiduciary relationship and arose out of the purchase of assets owned by Subsidiary Debtor pledged with J. P. Morgan & Company in 1930 and purchased at a public sale September 30, 1935, by Midamerica Corporation, a corporation formed for that purpose of [by] O. P. and M. J. Van Sweringen, directors of Subsidiary Debtor, and George A. Ball and others and the distribution in liquidation of those assets to George and Frances Ball Foundation." (R. 2.)

THE FACTS FOUND BY THE SPECIAL MASTER AND THE DISTRICT COURT.

The application for compensation of Special Counsel, respondents here, and the petition for compensation filed by the petitioners, were heard before Charles I. Russo, as Special Master. In his report, appearing in the printed record, at pp. 64-74 inclusive, the Master first recounts the successive steps leading up to the recovery by the counsel appointed by the Court, and then concludes:

> "Taking into consideration all of the proper factors and elements, and allowing for some duplication of effort, among counsel assigned to the task, an allowance of Sixty-five Thousand Dollars ($65,000.00) appears fair and proper." (R. 66.)

(Special Counsel had applied for $75,000.00.)

Proceeding then to the petition for compensation filed by the petitioners here, Meyer Abrams, Harry J. Meyerson and Fannie B. Stern, as Executrix, the Special Master said:

> "Petitioners do not claim that Messrs. Leckie, Fogg, Sharp and Davis (Local counsel in Indiana), were not properly appointed, and acting; they do not claim that Messrs. Leckie, *et al.* did not perform the services alleged; they do not deny that the recovery was made, and they do not object to the allowance requested, but base their own (petitioners') claim for compensation upon their contention that the claim against the Ball interests, which resulted in the recovery was, to use petitioners' words '* * * conceived by your petitioners as a result of an investigation of the facts, a study

of the law, and the institution of a cause of action in the District Court of the United States for the Northern District of Ohio, and also in the District Court of the United States for the Southern District of Indiana * * *'." (R. 67.)

The Special Master then reviewed at some length the various claims of the petitioners and the evidence in the record concerning them, and concluded:

"It does not appear unreasonable to require that one who seeks compensation for services shall clearly point out a substantially definite accomplishment, or substantial contribution thereto, or the performance of pertinently proper services. The burden of justifying a requested allowance is upon the one who seeks it. Volunteers of unauthorized and useless services cannot be rewarded.

"In view of all of the foregoing herein it appears apparent that petitioners contributed nothing to the recovery from the Ball interests and hence should receive no compensation predicated upon such recovery." (R. 72.)

Upon this report, and the objections to it filed by the petitioners here, the District Court conducted an oral hearing on October 26, 1943, receiving some additional evidence on behalf both of Special Counsel and of the Objectors. (R. 84 to 94.) The Court's opinion and finding appear in the printed record, pp. 94 to 99. We quote brief extracts:

"The suit against Ball, out of which the recovery of $550,000.00 was had, received its origin and impetus from the decision of this Court in respect of the claim of Midamerica against the Debtor, as affirmed by the Circuit Court of Appeals. It was in that action that the legal and equitable status of the Midamerica securities and Ball's interest therein was laid bare and characterized. That decision was the basis of the suit finally commenced against Ball and declared the principles upon which the recovery against Ball depended. No lack of diligence or good faith upon the part of this

Court's Supervising Trustees, or its specially appointed counsel, occasioned any delay in bringing the Ball suit, nor did any action or prodding of these applicants hasten the filing of the suit." (pp. 94 to 95.)

"Nothing that these objecting applicants did (the petitioners here), in respect of the Ball suit, had any influence or effect upon the Court's instructions to its independently appointed officers. Neither in the so-called Howe suit nor in other proceedings instituted by these objectors, were any beneficial results produced that could be held to have brought about the ultimate Ball suit which resulted in the recovery settlement." (p. 95.)

"I have considered carefully the oral arguments of counsel upon the hearing of the objections, the briefs, the record, and the Master's report, and am satisfied that these objectors are in no position to apply for compensation; that they are not entitled to receive anything, under the facts and the law, *and that no claimed ideas or acts of theirs in any conceivable way contributed to the recovery against Ball.* My decision of disallowance is not based upon the theory that the objectors were volunteers and for that reason not entitled to be compensated but it is *bottomed upon the considered judgment that the objectors contributed nothing to the recovery against Ball,* and are not entitled to any allowance out of the settlement of the Ball suit." (p. 97.) (Emphasis ours.)

ARGUMENT.

I. The Facts Found by the Trial Courts are Conclusive Unless "Clearly Erroneous."

The findings of fact, both by the Master and by the Court, that the petitioners performed no services beneficial to the estate, and contributed nothing of value towards the recovery for which compensation is now sought, conclusively bar petitioners from any recovery unless such factual findings were "clearly erroneous."

General Order in Bankruptcy Number 47, following Section 53, 11 U. S. C. A., is made applicable to proceedings

under Chapter X by General Order Number 52. General Order No. 47 provides:

> "Unless otherwise directed in the Order of Reference, the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the Judge shall accept his findings of fact unless clearly erroneous. The Judge, after hearing, may adopt the report or may modify it or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions."

General Order Number 47 is consistent with Rule 53 (e) (2) of the Federal Rules of Civil Procedure, which likewise provides:

> "In an action to be tried without a jury, the Court shall accept the Master's findings of fact unless clearly erroneous."

And when a case reaches a reviewing court, the same rule is applied that the findings of the trial court will not be set aside unless *plainly erroneous.* We quote from the opinion of the Circuit Court of Appeals in the case of *Abrams, et al. v. Cleveland Terminals Building Co.,* May 31, 1943, 136 F. (2d) 537, certiorari denied, 320 U. S. 788, at p. 538 of the Circuit Court of Appeals' opinion, as follows:

> "It is the settled law, repeatedly asserted in this Circuit, that the concurrent findings of the District Judge and the Master will not be set aside, unless plainly erroneous. *In re Allied Products Co. (Continental Casualty Co. v. Harold H. Barnett, Trustee in Bankruptcy),* 6 Cir., 134 F. (2d) 725, decided April 8, 1943; *Kowalsky v. American Employers' Insurance Co.,* 6 Cir., 90 F. (2d) 476, 480."

Of like import see

Abrams, et al. v. Scandrett, et al., 138 F. (2d) 433, certiorari denied 321 U. S. 770;

New Southern Ohio Gas Co., et al. v. Roush, et al., 138 F. (2d) 411;

Fruehauf Trailer Co. v. Bridge, 84 F. (2d) 660, 663; *Bagley v. Rowley*, 127 F. (2d) 139, 140.

II. On the Facts Found the Petitioners Are Not Entitled to Compensation.

Article XIII of Chapter X of the Bankruptcy Act 11 USCA, Sections 641 to 650, govern the award of compensation in corporate reorganization proceedings. Section 643 (243 B. A.) reads:

> "The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or *which were beneficial in the administration of the estate*, and to the proper costs and expenses incidental thereto." (Emphasis ours.)

Note that "the Judge shall give consideration only to the services which *contributed to the plan* confirmed or to the refusal of confirmation of a plan, or which were *beneficial in the administration* of the estate."

It is obvious that the services here involved had no connection with the approval or disapproval of any plan. If the petitioners performed any services falling within the purview of this section they must have been such as "were beneficial in the administration of the estate."

But the trial tribunals, the Special Master and the District Court, both found that issue of fact against the petitioners; found that they "contributed nothing to the recovery against Ball." (Opinion by District Judge Jones, *supra*, R. p. 97; see also the Master's Report quoted *supra*, R. pp. 64-74.)

These findings of Fact must be set aside as "clearly erroneous" before petitioners can prevail. *There is nothing in the opinion of the Circuit Court of Appeals to indicate any thought of setting aside the factual findings of the Master and District Court.*

III. The Circuit Court of Appeals Correctly Held That the Petitioners Would Not Have Been Entitled to Compensation Even if the Facts Were As They Claim Them to be.

Such, in essence, was the reasoning of the Circuit Court of Appeals. The Court did not undertake to set aside, or to find unsupported by the evidence, the factual findings of the District Court and of the Special Master. Rather, it recited the facts, in part as found by the trial court and in part as claimed by the petitioners (Appellants below), and then concluded:

> "Appellants, having been compensated for services rendered directly in connection with the reorganization, their claim here must be confined exclusively to beneficial services, if any, rendered to the Subsidiary Debtor in the prosecution of the claims against Midamerica Corporation and its assignees, the Balls and the Ball Foundation. The claim in question was in existence at the time of the institution of the reorganization proceedings. It was a chose in action which passed to the Subsidiary Debtor in possession and it was the duty of the Subsidiary Debtor in possession to collect it. The claim was merely an incident to the reorganization proceeding. Whatever appellants did about the claim was in effect as attorneys for the Subsidiary Debtor, and not as attorneys for creditors. * * *" (R. 108.)
>
> "Under General Order 44 (11 USCA 52), an attorney for a receiver, trustee or debtor in possession can be appointed only on order of the Court granted upon a petition stating specified facts and the employment of the attorney must be for a specific purpose, unless the court is satisfied the case is one justifying

a retainer. General Orders have the force of law. *Weil v. Neary*, 278 U. S. 160, 169. This General Order cannot be by-passed by the creditors or their attorneys acting for the Debtor without the consent of the Court. Since appellants do not bring themselves within the General Order in question, it is immaterial whether or not their services were beneficial to the Subsidiary Debtor. They are entitled to nothing here." (R. 109.)

The Court therefore affirmed the District Court, (a) in the *allowance* made to Special Counsel, respondents here, and, (b) in the *disallowance* of claims of the counsel who are the petitioners before this Court. There is ample support for that action, in both of its phases.

The rule has been receiving increasing recognition in recent cases that no compensation should be allowed to attorneys who are not appointees of the Court, unless the following elements conjoin,—viz:

1. They are beneficial to the estate;

2. The Trustee refused to act; and

3. Formal authorization was procured from the court in advance for authority to proceed.

To this effect see:

In re New York Investors, Inc., 130 F. (2d) 90, syllabus 1;

In re Porto Rican American Tobacco Co., 117 F. (2d) 599;

In re Progress Lektro Shave Corporation, 117 F. (2d) 602;

In re Postal Telegraph & Cable Corporation, 119 F. (2d) 861;

In re Eureka Upholstering Co., 48 F. (2d) 95.

Syllabus 1 in *In re New York Investors, Inc.* (C. C. of A., 2nd Cir.) 130 F. (2d) 90, reads:

"It is duty of trustee in bankruptcy to perform all services requisite to administration of bankrupt's es-

tate, and compensation may not be awarded from the estate to others than trustee and his duly authorized attorneys and agents, unless such others' services benefit the estate, and unless trustee has refused to act and formal authorization has been procured from court to proceed in his stead."

In re Porto Rican American Tobacco Co., 117 F. (2d) 599 on p. 602, column 1, it was said by the same Court:

"The services of the appellant, other than those relating to the preparation and filing of the petition, appear to relate to matters which concerned the interests of other parties to the proceeding more closely than the interests of the debtor. The appellant's services from the filing of the petition until the trustees came forward with their first plan necessarily pertained to the administration of the estate. This was the duty of the trustees and any legal services required in connection with administration should have been performed by their attorneys. This Court has held both under the old Bankruptcy Act and under section 77B that a volunteer, even if his services have benefited the estate cannot be compensated out of the estate for services which should have been performed by the trustee or his attorney, unless the volunteer is authorized by the court in advance of rendering the services. * * * *There is no reason for a different rule under chapter X.* For services pertaining to administration, since trustees were appointed and had their own attorney, the appellant must be regarded as a volunteer.

"For services rendered in opposition to the modified plan the appellant was duplicating the efforts of the stockholders' committee who also opposed it. * * * Certainly if the debtor is to supplement the efforts of the committees at the expense of the estate, the need of such additional services should be brought to the attention of the court, and authorization to serve for compensation should be obtained *in limine*. The same considerations which govern as to administration when there is a trustee should govern as to opposition to a plan when stockholders are already adequately represented." (Emphasis ours.)

Syllabus 2 in the case of *In re Postal Telegraph & Cable Corporation* (C. C. of A. 2nd Cir.) 119 F. (2d) 861, reads:

> "No compensation can be allowed out of debtor's estate for administrative services rendered in administration of estate in proceedings for corporate reorganization, unless the person seeking compensation prior to the performance of such services obtained authority from the court to so act."

The petitioners, here, meet none of these tests. The Master and Court found as a matter of fact that their services were not beneficial to the estate; *and so long as that finding stands it is of no consequence whether the other two tests are sound and in conformity with Sections 242 and 243 of the Chandler Act (Sections 642 and 643, Chapter 10, 11 U. S. C. A.), or whether the Court of Appeals in this case was correct in its position.*

But it is not inconsistent with Sections 242 and 243 upon which petitioners here chiefly rely (see their brief pages 6, 25, 59) and with the Act in its entirety, and with the orderly administration of estates *in custodia legis*, that volunteer attorneys should not presume to act as counsel for the estate, unless—

(a) The duly designated court appointees do *not* act or for some reason *properly should not* act; or

(b) The court first approves the proffered aid of the unofficial counsel.

That, in substance, is the position taken by the Circuit Court of Appeals in this case, and by other courts of high standing in the cases above cited. And petitioners here lay no claim to the existence of either of these other two prerequisites.

But the question is academic in the matter now at bar unless new factual findings are made.

IV. The Circuit Court of Appeals Also Correctly Affirmed the District Court in the Allowance Made to Respondents.

1. In Awarding Compensation in a Proper Proceeding, for Services Rendered Before It, a Court has Broad Discretionary Powers.

This Court said in the fourth paragraph of the syllabus in the case of *Page v. Rogers, Trustee in Bankruptcy*, 211 U. S. 575:

> "The amount of fees to which counsel for the trustee in bankruptcy is entitled is a matter for the bankruptcy court and in this case this court will not interfere with the amount fixed."

In the case of *In re Diamond Fuel Co.*, 6 F. (2d) 773, the Circuit Court of Appeals of the Second Circuit held, quoting paragraph 3 of the syllabus:

> "An order of the District Court allowing attorneys fees will not be reversed, unless unmistakably wrong as matter of law, or an abuse of discretion is shown."

In *Tennessee Finance Co. v. Thompson* (C. C. A. 6th Cir.), 278 Fed. 597, it was said by the Court through Knappen, *C.J.*, at p. 600 of the report:

> "It is the settled rule of this court that a finding by a referee in bankruptcy affirmed by the District Judge, will not be set aside on appeal on anything less than a demonstration of plain mistake. *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155, 158 * * *; *In re Sweeney*, 168 Fed. 612, 615 * * *; *Deupree v. Watson*, 216 Fed. 483 * * *. Such is also the rule in case of concurrent findings of master and judge. *Firestone Co. v. Riverside Co.* (C. C. A. 6), 247 Fed. 625, 160 C. C. A. 35, and cases cited."

It was held by the Circuit Court of Appeals of the Ninth Circuit in *In Re Barceloux*, 74 F. (2d) 288, quoting paragraph 5 of the syllabus:

> "Circuit Court of Appeals' power to review bankruptcy court's order allowing compensation to attor-

neys for trustee in bankruptcy, held limited to question of law whether there was manifest abuse of discretion (Bankr. Act, Sec. 24b, 11 USCA Sec. 47(b))."

These cases state the established rule. See:

In re American Range & Foundry Co., 41 F. (2d) 845;

In re Sheinman, 33 F. (2d) 901, 902;

Page et al. v. Rogers (6 C. C. A.) 149 Fed. 194;

Palmer v. Paramount Pictures, Inc., 85 F. (2d) 588;

Silver et al. v. Scullin Steel Co., 98 F. (2d) 503;

Mercantile Commerce B & T Co. v. Southeast Arkansas Levee District, 106 F. (2d) 966;

Campbell v. Green, 112 F. (2d) 143;

Forbes v. American Mail Line, 115 F. (2d) 196;

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Kowalsky v. American Employers Ins. Co., 90 F. (2d) 476;

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Sullivan & Cromwell v. Colorado Fuel & Iron Co. (C. C. A. 10), 96 F. (2d) 219;

Abrams v. Cleveland Terminals Building Co. (C. C. A. 6), 136 F. (2d) 537; certiorari denied 320 U. S. 788.

2. The Court Before Which Legal Services Are Rendered, in Fixing Compensation to be Paid Therefor, may Properly Give Weight to Facts Within its Own Observation and Knowledge.

We quote from the opinion by Judge Augustus N. Hand, in the case of *In re New York Investors, Inc.*, 130 F. (2d) 90, p. 92, second column:

"Although the RFC (the appellant) may have benefited the creditors by opposing the claims of the trustees and their attorneys for compensation, which are set forth in (b) and (c), yet it is a mere guess how

far, if at all, their efforts increased the sum available for distribution among the creditors and whether had there been no objections on the part of the RFC the Court would not have made the same allowances as it did. *Only the District Judge could have settled this doubt for only he could have known what affected his judgment in making the awards.*" (Emphasis ours.)

The same principle was expressed by Judge Woodrough of the Circuit Court of Appeals of the Eighth Circuit in *Cooke v. Bowersock, et al.* (Oct. 16, 1941), 122 F. (2d) 977, at p. 981, as follows:

> "The right of the appellees to an allowance is determined by 11 U. S. C. A. Secs. 642 and 643 as amended by the Chandler Act and as interpreted by the decisions, and the parties agree that the decisions recognize a discretion vested in the District Court and that *the appellate courts must give due regard to the opportunity of the District Judge not only to hear, observe and judge of the credibility of the witnesses, but also to familiarize himself with the proceedings and the services of counsel for which compensation is asked.*" (Emphasis ours.)

Syllabus 12 in *Silver et al. v. Scullin Steel Co.*, 98 F. (2d) 503, reads:

> "In reorganization proceedings, court of bankruptcy, in determining attorneys' fees of counsel of stockholders or creditors, must weigh the evidence, taking into consideration the self-interest of each applicant, *and in light of his familiarity with proceedings in his court* and with knowledge of value of services, which he is satisfied were actually rendered, must arrive at some approximately fair conclusion." (Emphasis ours.)

And in the article on "Attorneys" in 7 *C. J. S.* at p. 1093, it is said that the court may form an opinion of the value of the attorneys' services "from the *facts* or evidence before it."

Syllabus 1 in *Tracy et al. v. Spitzer-Rorick Trust & Savings Bank,* 12 F. (2d) 755, reads:

> "Fixing of attorney's fees in ancillary action to foreclose corporate mortgage and have ancillary receivers appointed rests in sound judicial discretion of judge in whose court services were performed, and judge is not absolutely bound by expert evidence as to value of such services, because he himself is an expert."

And in the opinion it is said further, beginning on p. 756, first column:

> "The matter of these allowances for fees was tried before the court. * * *.
>
> "With practically all of these services, *the trial court was personally familiar.* For, while many of the contested matters were litigated before the special master, it may be assumed that in all which were of any moment exceptions would be taken and fought out before the court. The basis for this assumption is not entirely clear from the record, which, however, does disclose that some 10 days were occupied in work in the District Court, and so, other entries regarded, this work must have been performed in matters of exceptions. *The trial court also personally knew,* whether appellants or local counsel had borne the brunt of this litigation, and which of such counsel had rendered the greater part or the more valuable services. After patiently hearing the expert witnesses, and Mr. Welles of appellant's firm, after considering the affidavits and the counter affidavit, *and in the light of his own knowledge,* the trial court allowed a total fee of $16,000.00 for the services to the receivers here in dispute * * *.
>
> "* * * The matter of fixing attorney's fees in a case such as this rests in the sound judicial discretion of the judge in whose court the services were performed." (Emphasis ours.)

The Court further quoted on p. 757 from the opinion of Judge Sanborn in *Farmers Loan & Trust Co., et al. v. McClure,* 24 C. C. A., 64, 78 Fed. 209 as follows:

> "The judge who entered this decree below *was familiar with the proceedings in his own court,* with the character of this litigation, with the controversies, if any, that had arisen in it, with the amount of services that had been rendered by each of the solicitors, and with every step that had been taken in the case. It is the settled rule of the federal courts that where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct." (Emphasis ours.) (78 Fed. p. 210.)

To the same effect see *Trustees v. Greenough,* 105 U. S. 527, 537; *In re Associated Towel & Linen Supply Co.,* 7 F. Supp. 699.

3. The Allowances Here Made Are Not Unreasonable.

In the Court of Appeals for the first time, petitioners attacked the amount of the allowance to respondents recommended by the Master and approved by the Court. Theretofore they had seemed merely to seek for themselves a part of it, or, perhaps, something over and above it.

The Master said in his report:

> "Petitioner do not claim that Messrs. Leckie, Fogg, Sharp and Davis were not properly appointed, and acting; they do not claim that Messrs. Leckie, *et al.,* did not perform the services alleged; they do not deny that the recovery was made, *and they do not object to the allowance requested.* * * *." (R. 67.) (Emphasis ours.)

And petitioners, in the objections which they filed before the Master, say:

> "There is, therefore, no basis for the allowance of the $65,000.00 *to them alone.*" (R. 80.) (Emphasis ours.)

And Paragraph One of the prayer to petitioners' objections filed to the Master's report reads in part:

> "WHEREFORE, Objectors (the petitioners) pray that the Master's report be rejected; that the recommended

allowance of a total fee for the recovery of the $550,000.00 *be divided.*" (R. 76.) (Emphasis ours.)

Petitioners *now* insist that the allowance was excessive (pp. 6, 21, 24, 38, 39, 40). They cite a number of cases which they assert support that thesis. Each case must stand on its own facts. Many other cases could be cited of contrary import. A relatively few of them are as follows:

In re Prudence Company, 21 F. Supp. 316, where fees in the sum of $50,000.00 were allowed for a recovery of $261,000.00.

Trautz v. Lemp et al. (Missouri Supreme Court), 72 S. W. (2d) 104, where fees totalling $63,200.00 were allowed for a recovery for a trust estate of stock valued between $310,000.00 and $465,000.00.

Hodgman v. Atlantic Refining Co., 8 F. (2d) 777, where in an equity case, fees were allowed upon the schedule of 33⅓% on the first $500,000.00; 10% upon the next $500,000.00, and 5% upon the excess over $1,000,000.00, the total recovery having been between three and four million dollars.

Regan v. Babcock, 196 Minn. 243, where in a taxpayer's suit, fees of $60,000.00 were allowed for a recovery of $390,000.00 for money illegally paid out on paving contracts.

Whitney v. New Orleans, 54 Fed. 614, where $66,600.00 was allowed for a recovery of $576,707.92.

In re Bignall, Bankrupt, 9 Fed. 385, where fees amounting to 20% of a recovery were held to be reasonable.

Murphy v. North American Light & Power Co., 33 F. Supp. 567, a derivative action, where $200,000.00 was allowed for benefits accruing as a result of the action, estimated by the Court to have been worth circa $900,000.00.

In re National Department Stores, Inc., 11 F. Supp. 633, where counsel for the receiver and debtor in a cor-

porate reorganization proceeding were allowed compensation in the sum of $50,000.00 for 1508½ hours of services of a general and miscellaneous nature.

In re Levinson, 19 F. (2d) 253, where counsel were allowed fees of $42,500.00 for bringing in to the estate additional assets of $165,608.00.

Page, et al. v. Rogers (6 C. C. A.), 149 Fed. 194, where a fee of $15,000.00 was allowed to the attorney for a trustee in bankruptcy for the recovery of a preferential transfer in the amount of $70,891.00.

In re People by Beha, State Superintendent of Insurance, 242 New York Supp. 100, where counsel were allowed a fee at the rate of $40.00 per hour for successfully defending an insurance company, having net assets of about $450,000.00, against liquidation proceedings instituted by the State Superintendent of Insurance.

Smith, Appellee v. Kroeger, Supt. of Building and Loan Assns., 138 O. S. 508, where it appeared that a fee was allowed to an attorney, who had successfully prosecuted a class suit, equal to 15% of the value of the fund thereby created by him, the fee totalling approximately $55,000.00.

Petitioners also complain because, as they say, Special Counsel's (Respondents') fees were calculated on a percentage or contingent basis (pp. 21, 24, 38, 39). This is not true. The Court was merely emphasizing the reasonableness of the allowance when it said (R. 99), "it is not quite 12% of the amount of the settlement."

It is hardly necessary to cite authorities to this Court that many considerations properly enter into the determination of a proper and equitable attorney's fee under given conditions. We quote for its persuasiveness from the opinion in the case of *In re Osofsky, et al.,* 50 F. (2d) 925, beginning in the first column, p. 927:

> "The elements to be considered in determining an attorney's fee were once most aptly summarized in evidence given on a reference by Honorable William G.

Choate, formerly a judge of this court, and David B. Ogden, Esq., a well known lawyer of a generation ago.

"They laid down the following elements as being matters properly to be considered when the fees of an attorney have not been agreed on beforehand, but are to be fixed: (1) The time which has fairly and properly to be used in dealing with the case; because this represents the amount of work necessary. (2) The quality of skill which the situation facing the attorney demanded. (3) The skill employed in meeting that situation. (4) The amount involved; because that determines the risk of the client and the commensurate responsibility of the lawyer. (5) The result of the case, because that determines the real benefit to the client. (6) The eminence of the lawyer at the bar, or in the specialty in which he may be practicing.

"Each case, of course, differs to some extent from every other case in respect of the importance of these several elements.

"In some cases the time element is dominant; in others the skill used seems specially to stand out; and in others still, the amount which a defendant has been saved, or which a plaintiff has recovered, may be the dominating consideration in the charge. But if all these elements are considered together, and the relative importance of each element is fairly weighed by an attorney, it is possible to arrive at a proper charge in almost any case without much difficulty."

Also:

"In bankruptcy cases, however, there seems to me to be another element which has to be considered. That is the fact that in bankruptcy very often futile quests for assets have to be made. Many times, however much ingenuity and time attorneys may expend, they may not be able to get anything for the estate by their efforts. It is then a question, as in salvage at sea, of no cure, no pay.

"When the efforts of attorneys cause a material increase in the bankruptcy estate, or, as here, create it, they should be well rewarded; otherwise there will

not be any incentive to attorneys to put forth their best efforts in cases which appear unpromising.

"Indeed the situation may very well be compared, as I have just hinted, to salvage at sea.

"In salvage cases courts have wisely come to think that, as a matter of public policy, it is necessary to give such adequate reward to a successful salvor as will make others to whom salvage situations are presented interested in attempting salvage operations. There must always be a flavor of generosity in the awards to success in order that an appetite for effort may be stimulated.

"This attitude involves a wise public policy and is as beneficial to shipowners, cargo owners, and underwriters in admiralty law as a similar attitude is to creditors in bankruptcy proceedings." (ibid. p. 957—1st and 2nd columns.)

In the *Osofsky* case, fees were allowed to the attorneys for a Trustee in Bankruptcy approximating 25% of the amounts recovered by them for an estate which otherwise would have been without assets.

In similar vein it was said in *Frink v. McComb,* 60 Fed. 486, at p. 489:

"There is no standard by which the compensation of counsel can be properly and definitely determined as to amount. The question, when presented at this time, must be decided upon considerations as vague and indefinite as when it was said in the Mirror (chapter 2, Sec. 5, that 'four things are to be regarded: (1) The greatness of the cause; (2) the pains of the serjeant; (3) his worth, as his learning, eloquence, and gift; (4) the usage of the court.' "

In the *Frink* case, fees aggregating 33⅓% were allowed for a recovery of $91,400.00.

Petitioners themselves have stressed the significance of *results* and the relative unimportance of time in appraising the value of legal services. Petitioner Abrams, in testifying before the Master on petitioners' application for $25,000.00 in fees, said:

"The Witness: I have practically stated in substance everything that was done in connection with this claim, *and our main basis for the fee is not the number of hours* that are scheduled—the number of hours in a case of this nature is not of great importance—but on the following things: that all of the facts which form the basis of the claim was supplied by us before anybody else knew anything about it, and that appears from the document that I have offered in evidence as early as 1937." (R. 52.)

And in their application itself, petitioners say:

"A separate charge and date for each item of service rendered by petitioners is not practicable and *would not serve fairly to apprise the court as to the value of their services.*

"Petitioners say that the fair and reasonable compensation for their services *in connection with the benefits rendered* to the estate are reasonably worth the sum of Twenty-five Thousand Dollars ($25,000.00)." (R. 24.)

It is not the fact that the Master and the Court arrived at the allowance they accorded, as upon a percentage or contingent basis. This is readily apparent upon an inspection of the Master's report and the Court's opinion, from which we quote, briefly below. They did, however, properly, stress results and benefits and the difficulties encountered.

The Master said in his report:

"Messrs. Leckie, Fogg and Sharp acted under the orders of the Court, and in pursuance and execution of the duties assigned to them, in performing the services which resulted in the recovery of this asset." (R. 65.)

"Briefly stated the asset recovered was not an apparent or known, asset, and was developed by applicants, from a more or less doubtful inchoateness to a cash recovery in the sum of Five Hundred Fifty Thousand Dollars ($550,000.00)." (R. 65.)

"Taking into consideration all of the proper factors and elements, and allowing for some duplication of effort, among counsel assigned to the task, an allowance of Sixty-five Thousand Dollars ($65,000.00), appears fair and proper." (R. 66.)

And it was said by the District Judge in his opinion rendered November 9, 1943, appearing in the printed Transcript of Record, pp. 94 to 99:

"The continued efforts throughout the proceedings, and briefs of the objectors, to discredit the efforts of the officers of this Court, and to gain credit for themselves, not only is unfair and unjust, but without the slightest support or justification. On the contrary, the special counsel, after several conferences with the Court, prepared the case against Ball and instituted the suit in Indiana upon the basis of the findings of this Court, as affirmed by the Circuit Court of Appeals, and it was upon those principles that the case was begun and prosecuted to a successful and, as I think, a highly satisfactory settlement under all of the circumstances. There is not the slightest ground for asserting that the suit and settlement were the result of the conception or actions of the objectors * * *."

"This situation is not like the ordinary bankruptcy where the Judge seldom has knowledge of the legal services performed and must rely upon the Referee's recommendations to a large extent. In this case, the Court has personal knowledge and a full understanding of the nature of the problems involved and the character of service required to be rendered. The nature, extent and value of the legal services required also are fully known and understood. No action of like character brought against a prominent and philanthropic citizen in his own bailiwick is dead certain of success. The charges must be skillfully drawn and the case fully prepared in advance, to insure the full and careful consideration of the resident court. It is my considered judgment, based upon such knowledge and understanding, that the Ball suit was skillfully prepared and that the results achieved were due to that fact.

"I have examined the application of Special Counsel and it is my independent judgment that the amount recommended by the Master is not in excess of a fair appraisal of the value of these services. It is not quite 12% of the amount of the settlement and is reasonable compensation for the services performed, within the meaning and intention of the Bankruptcy Act." (R. 98, 99.)

V. Petitioners' Arguments Answered.

Many of the arguments advanced or suggested by the petitioners have already been adequately answered. Some others we will now briefly note, as follows:

1. That the Circuit Court of Appeals did not agree with the factual findings of the District Court that the petitioners had contributed nothing of value to the estate in connection with the Ball recovery. (4, 5, 19, 20, 51, 63.)*

We believe a careful reading of the Appellate Court's opinion leads to quite a different conclusion. We find no intimation of a purpose to set aside the findings of fact of the trial tribunals or to adjudge them "clearly erroneous." Rather the Court's opinion is analogous to a plea by way of "confession and avoidance." It relates the facts, partly as found by the trial court, and partly as claimed by the petitioners, the appellants below, and then says in substance:

"Considering all they claim, still they are entitled to nothing here."

Taking that position, it was not necessary for the Court to assume the burden of reviewing and weighing the evidence, or even to be punctilious in a precise recital of it. Even much of petitioners' own brief is devoted to a recital of alleged "mistakes" of fact in the opinion.

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* References thus made are to pages in petitioners' brief.

2. That the "Chose in action," the case against the Ball interests, was made a part of the reorganization plan. (59.)

Petitioners thus attempt to meet the position taken by the Circuit Court of Appeals that their services were not rendered "in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan." (Section 643, 11 U. S. C. A.) But rather "in connection with the administration of the estate." (Ibid.)

The argument is that the allocation of the claim against the Ball interests was provided for in the Plan, since it was one of a group of claims that, by the terms of the Plan as adopted, were to be transferred to an examiner, "for the benefit of the estate."

This position is so forced as to fall of its own weight in the stating of it.

3. That General Order Number 44 should have been applied against the respondents so as to deprive them of any compensation for services rendered prior to the date of their formal appointment as Special Counsel on May 1, 1941. That as to services prior to that date respondents were volunteers. (2, 3, 4, 5, 6, 10, 15, 16, 20 to 29, 63.)

This position was also strenuously pressed by the petitioners before the Court of Appeals. It has a ring of superficial plausibility, which fades when the facts are fully understood.

Petitioners in their printed "Transcript of Record" cause to be set forth in full a copy of that portion of the itemized schedule attached to Special Counsel's petition for compensation which antedated May 2, 1941. (R. pp. 7 to 19.) It is their position that as to all these services respondents were volunteers. Let us "look at the record."

Mr. Sharp was appointed Special Counsel for the Subsidiary Debtor to represent it in connection with the Midamerica claims,* and the Subsidiary Debtor's interest in the affairs of The Higbee Company, in July and August, 1937, and so served continuously thereafter. (R. 27.)

On February 8, 1938, Messrs. Leckie and Fogg were appointed by the Court to supervise the affairs of the Subsidiary Debtor, "and to perform such legal services as may be proper and necessary in connection therewith" (R. pp. 6 and 7), with only two exclusions from their authority, viz:

(a) "With respect to claims (obviously claims *against* the Subsidiary Debtor) now pending in this proceeding"; and

(b) "With respect to any Plan of Reorganization herein." (R. 6, 7.)

Now the duties of these two supervisors, and their authority under this order, were plainly of sufficient scope to encompass, at least, the consideration and investigation of any and all assets of their charge, the Subsidiary Debtor, whether obvious or hidden, tangible or mere choses in action. They were responsible to the Court for the conduct of the Subsidiary Debtor. And the Court of Appeals of the Sixth Circuit had said in *Gochenour, et al. vs. Cleveland Terminals Building Company,* 118 F. (2nd) 89 at page 94:

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* Midamerica Corporation, dominated by the Van Sweringen brothers who controlled the Debtor and Subsidiary Debtor, and financed by George A. Ball, purchased much of the collateral sold at the Morgan auction sale of Sept. 30, 1935. Among the assets purchased were debentures that had been theretofore issued both by the Debtor and Subsidiary Debtor. Claims in these proceedings were filed on these debentures. Objections to such claims against the Subsidiary Debtor were filed and prosecuted by Mr. Sharp as Special Counsel. Corresponding claims against the Debtor were similarly opposed by Messrs. Leckie and Fogg as Trustees of the Debtor. Such objections were ultimately upheld by the Circuit Court of Appeals. See *In re Van Sweringen Company, etc.*, 119 F. (2d) 231; opinion rendered April 16, 1941. This case will be referred to further, *post.*

> "A debtor continued in possession under the present act has authority and *it is its imperative duty* with all diligence to collect the assets of the estate." (Emphasis ours.)

Thus, naturally and properly so functioning, they studied the possibilities of affirmative action on the facts and theories developed in the opposition to the Midamerica claims. They would have been remiss in their duties if they had done otherwise.

The services so rendered, wholly within the scope of their authority as Supervisors and counsel for Subsidiary Debtor, they included in their general fee bill which was acted upon by the Master in his report filed with the Court on May 23, 1942. (See Exhibit Number 28 of Appellees below, R. 47, not printed.) This report of the Special Master was approved by the Court on August 27, 1942.

Mr. Sharp likewise included in his general fee bill the services rendered by him in the same connection prior to May 1, 1941. (See his testimony, R. 26 *et seq.*)

The Master allowed to Mr. Sharp compensation for such services upon his part, but expressly postponed consideration of the services so rendered by Messrs. Leckie and Fogg. He said in his report of May 23, 1942 (Respondents' Exhibit 28, R. 47) at p. 25:

> "In many respects it is difficult to separate or recognize the services performed as legal services, as distinguished from the services required to be performed by petitioners as Supervisors. Said application includes extensive services rendered in connection with a certain claim and suit against George A. Ball and George and Frances Ball Foundation, which latter resulted in a recovery of approximately Five Hundred and Fifty Thousand Dollars ($550,000.00) in cash, from said Ball and Foundation. *As to the latter, the services can be better appraised upon new application to be made now that the Ball Foundation litigation appears to have been successfully terminated.*"

The Master's recommendations in this respect were duly approved by the Court.

So, *as expressly directed by the Court*, the services performed by Messrs. Leckie and Fogg, looking towards the ultimate Ball recovery, but actually performed while they were functioning as attorneys in matters under their supervision, were included in their petition for compensation which is now under attack. They are the items set up in the Printed Transcript of Record, pp. 7 to 19:

So the Master properly found:

> "Messrs. Leckie, Fogg and Sharp acted under the orders of the Court, and in pursuance and execution of the duties assigned to them, in performing the services which resulted in the recovery of this asset." (R. 65.)

Mr. Sharp testified at the hearing of October 2, 1942 before the Master:

> "One thing that perhaps calls for a little comment and explanation is that Mr. Leckie, Fogg and Sharp were appointed special counsel to bring this suit against the Ball Foundation and to handle all matters in connection with it by an order of court entered on May 1, 1941. The account of the services and detail of the services given in the application goes back to a much earlier date than that. I want to say that as to the services which are detailed, and the time which is detailed, prior to May 1, 1941, it includes only time of Mr. Leckie and Fogg and their offices. I did a great deal of work prior to that time but it was regarded as incidental to my duties and appointment as special counsel with reference to the Midamerica claim and the Higbee matter. And when my application was filed pursuant to the order of the Court setting forth the services and the claim for services down to August, 1941, all of the time that I had put in up to August, 1941, except that which was put in specifically on the Ball Foundation claim, after May 1, 1941, was included, and I think that the allowance which was made to me on that application must be considered to have covered those services.

> "Messrs. Leckie and Fogg also included in the claim which they filed at the same time as attorneys for the supervisors, for themselves as supervisors, *the services that they had performed in the Ball matter* down to the same date, but in the allowance which was made by the Master and confirmed by the Court with reference to their application, it was stated that *services performed in connection with the Ball claim and Ball litigation had been excluded and should be considered in connection with an application which would later be made with reference to services in the Ball matter,* so that the application is made up in that way *pursuant to what we have understood to be the desire and intention of the Court,* and it includes the work done by Messrs. Leckie and Fogg and their offices specifically with reference to the Ball Foundation and Ball and related matters prior to May 1, 1941, and the work done by all three of us and our associate offices since May 1, 1941." (R. 26, 27.)

So respondent, I. Walter Sharp, is not asking now for compensation for any services prior to May 1, 1941. He has already been awarded compensation for such services. Respondents Frederick L. Leckie and Joseph G. Fogg *are* asking for compensation for services rendered prior to May 1, 1941, contributing towards the Ball recovery which they properly rendered as the court-appointed counsel of the Subsidiary Debtor, consideration of which the Court, *by its own previous order,* postponed and allocated for determination in connection with the very application involved in the matter now before this Court.

So respondents neither claimed nor were awarded any compensation for services rendered as volunteers and without due court appointment. As to Messrs. Leckie and Fogg, the Special Master and District Court merely grouped in the one amount that was awarded, both the services that contributed towards this ultimate recovery that were rendered under their general appointment of February 8, 1938, and the services they rendered to the

same end under the special appointment and authorization to file suit of May 1, 1941.

4. That General Order Number 44 and the established principles invoked by the Circuit Court of Appeals do not apply here because the Debtor was in possession and was "in an adverse position" (60), citing *In re New York Investors, Inc.*, 130 F. (2d) 90; *In re Cook's Motors, Inc.*, 52 F. Supp. 1007.

But here, while the Subsidiary Debtor has been in possession, technically, in that title and actual possession of its assets had not been transferred to a Trustee, yet it has, at all times, acted under the strict control of Messrs. Leckie and Fogg as Supervisors appointed by the Court. For all practical purposes these two Supervisors have been as fully in possession and control as they would have been as Trustees, *and Petitioners do not claim that Messrs. Leckie and Fogg were in any sense adverse to the litigation, which they, in cooperation with Mr. Sharp, did in fact successfully prosecute.*

5. That Subsidiary Debtor and its counsel had "abandoned the cause of action against Midamerica, its officers and assigns." (61.)

By this specious plea, petitioners seek to qualify under prerequisite Number 2 for compensation to an unappointed counsel, specified in the opinion of the Court of Appeals (R. 109), "that the Trustee or Debtor in possession refused to act."

The so-called abandonment is alleged to have been made by the answer filed on behalf of Subsidiary Debtor in the so-called Howe suit, which answer is a part of the record in Case Number 8708 in the Circuit Court of Appeals of the Sixth Circuit decided March 3, 1941 and reported in 118 F. (2d) 89, the "Printed Record on Appeal," in which was petitioners' (appellants') Exhibit "A" in the courts below.

An examination of the complaint in the so-called Howe case, which was Case Number 19982 in the District Court for the Northern District of Ohio, Eastern Division, filed September 11, 1939, entitled "John J. Howe, *et al.* v. The Terminal & Shaker Heights Realty Company, formerly known as Midamerica Corporation, *et al.*," discloses that the cause of action set up in that complaint was not grounded on the constructive trust doctrine, which was successfully applied by the respondents, here, *defensively* against the claims asserted by Midamerica (see 119 F. (2d) 231, decided April 16, 1941),* and *affirmatively* in effecting the recovery against the Ball interests, compensation for which is involved in the matters now before this Court. Rather the theory of the complaint in the Howe suit was actual fraud, collusion and conspiracy, which doctrine the Circuit Court of Appeals of the Sixth Circuit rejected in the appeal on the Gochenour objections to the Morgan claim reported in 111 F. (2d) 378.**

Paragraph 8 of the Howe complaint reads:

> "During the month of August, 1935, with full knowledge on their part that said The Cleveland Terminals Building Company was hopelessly insolvent, the individual defendants herein and said O. P. and M. J. Van Sweringen and one George A. Ball, then and now a resident of the State of Indiana (and because of such nonresidence he is not joined as a defendant herein), *conspired together* to organize said Midamerica Corporation for the purpose of acquiring the property described in Paragraph 7 hereof, *at a collusive public auction sale* of said collateral scheduled to be had on September 30, 1935, for a nominal and grossly inadequate consideration in proportion to the fair market value, to the substantial benefit and financial profit of all of the defendants, and to the detriment of plaintiffs

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* *In re The Van Sweringen Co.*, 119 F. (2d) 231.

** *Gochenour, et al. v. J. P. Morgan & Co.*, 111 F. (2d) 378.

and all of the creditors of said The Cleveland Terminals Building Company."

And, as said by the Special Master in his report of October 6, 1941 (R. pp. 44-46), the assets of the defendant corporation were then "negligible in value" (R. 45), and the individual defendants, directors, had not personally profited.

So, the Subsidiary Debtor by its appointed supervisors and attorneys, wisely opposed participation in this particular lawsuit. But at no time did they in any manner indicate any abandonment of the rights of Subsidiary Debtor of any value. In fact *at the very time the Howe suit was filed, they were engaged in opposing the Midamerica claims, and were considering the use, and afterwards did use, those same facts upon the constructive trust theory,* in the successful prosecution of the rights of Subsidiary Debtor against the Ball interests.

6. That the Howe suit in the District Court for the Northern District of Ohio, filed on September 11, 1939 (R. 20) and the so-called Gochenour suit in the District Court for the Southern District of Indiana filed October 11, 1939 (R. 21) had the effect of blocking off the defenses of laches and the statute of limitations to the action filed by Special Counsel in May, 1941, which resulted in the recovery. (45, 46, 49, 56.)

These two actions were grounded upon a discredited theory, actual fraud, the same theory that the same counsel asserted in their unsuccessful effort to defeat the deficiency claim of $27,777,718.27 of J. P. Morgan & Co. (See *A. B. Gochenour, et al. v. J. P. Morgan & Co.* [Feb. 16, 1940], 111 F. (2d) 378.) These actions were also filed by and on behalf of a special class of creditors, who were adjudged, in both cases, *not to have title to the causes of action* they sought to prosecute. See *Gochenour, et al. v. George and Frances Ball Foundation, et al.,* 35 F. Supp.

508, affirmed 117 F. (2d) 259; certiorari denied 313 U. S. 566; *Gochenour, et al. v. Cleveland Terminals Building Company,* 118 F. (2d) 89.

We wholly fail to perceive by what process of reasoning it could be considered by anyone that the filing of these two abortive, ill-conceived and unsuccessful actions, in any manner could have created the result claimed for them, or wherein, in any manner, they benefited or "protected" the estate of the Subsidiary Debtor.

7. That the Special Master "based his findings upon newspaper clippings." (19, 22, 50, 63.)

These clippings were offered, and were received by the Special Master, *not* as evidence of the *truth* of the statements therein contained, but as evidence of a *general public dissemination* of those statements, tending to disprove petitioners' claims of a prior or exclusive knowledge of them, or of a sort of finder's interest in them. For the purpose of showing that petitioners did not furnish this knowledge they were both competent and convincing.

8. That the respondents were delinquent in their duties in that they took no action to prevent the distribution by Midamerica of its assets to George A. Ball and Associates. (45, 49.)

Petitioners are careless of the facts. The distribution was made in the spring of 1937. (See copy of complaint filed by respondents on behalf of subsidiary debtor against George A. Ball, *et al.,* Exhibit "D" to respondents' petition for compensation, R. 4.) This was *before* any of the respondents had been appointed counsel in any capacity for the subsidiary debtor.

9. That three sets of lawyers, and so many conferences between them were unnecessary. (30, 36.)

The Court named these three counsel. There were reasons why each was specially qualified because of his

previous connections with these Proceedings,—Mr. Sharp as Special Counsel for the Subsidiary Debtor in the Midamerica, Higbee and other matters, and Messrs. Leckie and Fogg as Trustees of the Debtor and as Supervisors of and Special Counsel for the Subsidiary Debtor.

10. That petitioners possessed prior knowledge of the facts that formed the basis of the Ball recovery and first made use of them in these proceedings. (3, 48.) Petitioner's Exhibit "H" (13, 17, 33, 48, 51, 63.)

Here again is a plain issue of fact. It was resolved against the petitioners. And upon ample evidence. All three of the respondents testified before the District Court (R. 84, 87, 89) that they had no recollection of having seen or heard of Mr. Abrams' mysterious Exhibit "H" before he produced it at the fee hearing before the Special Master. Likewise, Mr. Fiery, J. P. Morgan & Company counsel, testified that Mr. Abrams had prepared this exhibit in connection with his objections to the Morgan claim and that it had never become part of the record. (R. 89.)

The Master said at the hearing on the appellants' petition, October 30, 1942 (R. 57, 58):

"In view of your statement, Mr. Abrams, your previous statement to the effect that you were the first to call attention of the court to the matter of the Senate investigation, I think possibly I can clear that up by stating this: That on March 17, 1937, one Walter G. Mitchell, investigator for the Wheeler Committee, visited me here in Cleveland. Mr. Mitchell had formerly been an accountant with the F.B.I. and assisted me in preparing cases when I was in the United States Attorney's office, where the services of an accountant were needed, whether by the Post Office Department or the Bureau of Investigation. Mr. Mitchell advised me he was here to examine the records of the subsidiary debtor, and it is my recollection that I called there and suggested that they give him every courtesy and show him anything he wanted to see. He was here a few days. There was another man here assisting at the

time. He left and sent me some papers. The first papers I received were long, legal length size papers, appearing to be mimeographed or typewritten, having some of the proceedings of the Wheeler Committee. I think it is that Resolution 71 you have reference to.

* * * * *

"Thereafter I received steadily, as they were printed, the printed copies of the various reports as they came out and am still receiving them."

And Mr. Fiery, counsel for Morgan, also had copies of these typewritten reports. (Transcript of hearing, October 30, 1942, p. 32.)

And in the spring of 1937 there were newspaper accounts of the Senate investigation, disclosing to the world the essential, basic transactions. (Transcript of hearing, October 30, 1942, p. 47. For copies of some of such articles, see Subsidiary Debtor's Miscellaneous Exhibit No. 9.)

Even if appellants had been the very first ones having any connection with this proceeding, to know, and to bring forth, and to attempt to make use of these facts, *non constat* that the estate was thereby benefited. The typewritten reports and galley sheets, Mr. Abrams claims he was the first to peruse, were soon converted into printed Congressional records and reports for all to read. Advance information of them by brief space of a few weeks or months profited the estate nothing.

But assuming for argument's sake,—

(a) That appellants did first discover the facts, and further, that

(b) They never before had asked for or received compensation for the use which they made of those facts;

does it follow that they may rightfully claim a proprietary interest in such knowledge of past events,—whether public

or private,—especially in view of the fact that those events were brought to light by a tax financed investigation?

And if a lawyer does learn of given facts, in whatever manner, and in some pertinent court proceeding discloses those facts, must all lawyers thereafter punctiliously eschew the use of those facts on pain of rendering tribute to the happy discoverer?

11. That the petitioners evolved the theories upon which the Ball recovery was effected. (3, 23, 36, 48.)

This, also, is a question of fact that was resolved against petitioners, on ample evidence. Mr. Abrams, himself, admitted that it did not occur to him that there was any ground for affirmative action *until long after* the subsidiary debtor's Special and General Counsel (the respondents) had been formulating their plans for such action.

Mr. Abrams testified before the Special Master on October 30, 1942 (R. 48):

> "It did not appear to us—I mean the petitioners—that this would give a cause of action against Midamerica or its stockholders for the profits that it made as a result of this purchase, * * *."
>
> "The question whether or not an independent suit would lie against Midamerica and stockholders for the illegal profit, or the alleged illegal profits that it realized *came to our mind in the middle of August 1939,* * * *."

While the first item in the schedule attached to respondent's petition for compensation (R. 7) reads:

> "*Nov. 22, 1938* Conference (Messrs. Leckie, Fogg, Petersilge and Resseger) on duties of Cleveland Terminals Building Company as result of decision of Special Master restricting Midamerica claims to amounts actually paid, especially with reference to theory that Midamerica acted as Trustee and as to whether subsidiary debtor should file suit against Midamerica, *et al.*"

And following that first item are five additional items of a similar nature which *antedated* the filing by the petitioners of their so-called Howe suit.

Quaere, further, *whether petitioners could now in effect claim royalties* upon the subsequent use of legal and equitable doctrines, having once publicized them by use earlier in these proceedings, if such were the case?

> 12. That the institution by respondents, as court-appointed Special Counsel, of the Ball litigation that resulted in the recovery, was instigated by the decision of the Circuit Court of Appeals on March 3, 1941 in the case of *Gochenour, et al. v. Cleveland Terminals Building Company,* 118 F. (2d) 89 (Case Number 8708, record in which on appeal was appellants' Exhibit "A" below). (22, 24, 25, 40 to 54.)

This charge, and the denial of it by respondents, created a factual issue which the trial tribunals, the Special Master and the District Court, decided adversely to the petitioners.

The case referred to, as presented to the Circuit Court of Appeals, was an appeal by the same counsel who are petitioners now before this Court, from an adverse order made by the District Court denying a petition which they had filed in these proceedings, seeking an order, either,—

> (a) Adjudging that the alleged cause of action which these petitioners had set up on behalf of their clients in the so-called Howe suit filed by them on September 11, 1939 against Midamerica Corporation and certain of its Ohio directors, was a cause of action which was not vested in the Subsidiary Debtor; or
>
> (b) Adjudging that the Subsidiary Debtor had abandoned all its rights under such cause of action; or

(c) Directing the Subsidiary Debtor to join as a party in this action and in the action the same counsel had filed in the District Court for the Southern District of Indiana;* or

(d) Authorizing the petitioners to prosecute these two actions on behalf of the Subsidiary Debtor.

The Circuit Court of Appeals in the appeal reported in 118 F. (2d) 89, decided March 3, 1941, had reversed the District Court to the extent of directing the Court to appoint an examiner to determine whether the facts alleged comprehended a cause of action in favor of the Subsidiary Debtor of sufficient value or merit to warrant its prosecution "against the officers, stockholders or directors of Midamerica Corporation" (118 F. (2d) p. 95, second column).

It has been the claim of the petitioners that, spurred on, or inspired, by this order, the respondents, Messrs. Leckie and Fogg, had obtained the orders of May 1, 1941 (R. 39, 40), authorizing and appointing them and Mr. Sharp as Special Counsel to file the action against the Ball interests, which was filed on June 1, 1941, and which resulted in the recovery.

Neither the Special Master nor the District Judge found any merit in this claim. Judge Jones of the District Court said in his opinion overruling petitioners' objections to the Master's report:

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* This action, *Gochenour et al. v. George and Frances Ball Foundation, et al.*, 35 F. Supp. 508, had been filed October 11, 1939 and had been dismissed by the Court on February 24, 1940 on the ground that the cause of action therein set up could not be maintained as an independent class suit.

It may be noted parenthetically, that in this suit the Petitioners sought to appropriate, *for the sole benefit of a particular class of creditors*, the chose in action against the Ball interests. Having failed in that attempt *to take it away* from the general estate, they now *ask the general estate to pay them* for those efforts.

"Nothing that these objecting applicants (referring to the petitioners here) did in respect of the Ball suit had any influence or effect upon the Court's instructions to its independently appointed officers. Neither in the so-called Howe suit nor in other proceedings instituted by these objectors were any beneficial results produced that could be held to have brought about the ultimate Ball suit which resulted in the recovery settlement. The plain fact is that the so-called clarification proceedings filed and prosecuted by these petitioners had a tendency to impair the work then in progress on the Ball suit later brought by the Court's Special Counsel, and the suit by Gochenour against Ball in Indiana, dismissed by that Court, might well have hindered or delayed the success of the Ball suit upon which later recovery was had." (R. p. 95.)

That finding of fact was not "clearly erroneous."

Despite the activity of the counsel who are the petitioners, now before this Court, rather than because of it, the Court and its appointed counsel, pursued a steady, persistent course which, in logical sequence, culminated in the recovery here involved. Stages in that course were highlighted by the following:

(a) The appointment of the respondents, Messrs. Leckie and Fogg, as Trustees of Van Sweringen Corporation, on February 9, 1937, and, on February 8, 1938 as Supervisors of The Cleveland Terminals Building Company, and as its attorneys generally, save in certain excepted matters, chief of which were assigned by the Court to the respondent I. Walter Sharp, first appointed as Special Counsel for Cleveland Terminals Building Company on July 14, 1937.

(b) The filing by Messrs. Leckie and Fogg as Trustees of Van Sweringen Corporation, and by Mr. Sharp as Special Counsel for Cleveland Terminals Building Company, of objections to claims filed against the Debtor and Subsidiary Debtor, respectively, on

obligations of these two respective corporations which Midamerica Corporation had purchased at nominal prices at the auction sale of September 30, 1935. Such objections were grounded upon the doctrine that Midamerica became a *constructive Trustee* in such purchases because of the fiduciary relationship which its dominating directors bore to the Debtor and Subsidiary Debtor. (See testimony of Mr. Sharp at the hearing before the Special Master October 2, 1944. R. pp. 27, *et seq.*)

(c) The sustaining of such objections by the Special Master on October 25, 1938 (Ibid.).

(d) The consideration, shortly after that finding, and on November 22, 1938, by respondents Leckie and Fogg and their associates, of the advisability of filing suit on the same theory against the Ball interests (see itemization of services attached to respondents' application for compensation, R. 7), such action having been deferred because of an attempt by the Claimants to obtain a rehearing on their claims and objections thereto, and because of the subsequent proceedings before the Master, District Court and Circuit Court of Appeals, ending in the decision sustaining the objections by the Circuit Court of Appeals on April 16, 1941. (*In re Van Sweringen Company, etc.*, 119 F. (2d) 231.)

(e) The further study made by Special Counsel and by the Supervisors or General Counsel of the Subsidiary Debtor of the desirability of such action in August and September, 1939, because of the fact that September 30, 1939 would mark the expiration of the four-year period for the filing of an action grounded upon fraud under the Statutes of Limitation of Ohio, and the conclusion that the Indiana limitation of six years would govern as to an action filed in that state. (Transcript of hearing on October 2, 1942, R. 27, 28.)

(f) The presentation to Judge Jones of the District Court on September 26, 1939 by the Supervisors (Respondents Leckie and Fogg) of the Subsidiary Debtor of an application for authority to institute an action against the Ball interests, and the withholding of such application because of the view of the District Judge that the matter should be referred on an application for instructions, with opportunity to the creditors to express their views. (Testimony of Mr. Fogg, Transcript of October 2, 1942, p. 55.)

(g) The filing of such application for instructions on September 30, 1939; its reference to the Special Master on October 3, 1939; and hearing thereon on October 12, 1939, continued on October 26, 1939, and report thereon by the Master on April 1, 1940 (see R. 14), wherein the Master said:

> "*Counsel for Subsidiary Debtor have indicated that they desire to await the outcome of litigation arising out of objections to the claims of Midamerica Corporation against Debtor and Subsidiary Debtor before taking action with respect to the proposed suit against Ball, et al., and that upon final disposition of the Midamerica claims said counsel will again apply to the Court for suitable instructions in the premises.* (Emphasis ours.)
>
> "WHEREFORE, by reason of all of the foregoing, it is respectfully recommended that the application of Subsidiary Debtor for instructions be dismissed without prejudice to the Subsidiary Debtor to file further application at such time as Subsidiary Debtor, in the proper presentation and administration of the estate herein deems it necessary so to do."

(h) Continued study of the factual and legal background of the proposed litigation against Ball, coupled with negotiations between the appointed counsel of Subsidiary Debtor and representatives of the Ball interests for a settlement of the claim. (See item-

ized schedule of services attached to application for compensation by Special Counsel. [Respondents] R. pp. 7 to 19.)

(i) The favorable opinion by the Circuit Court of Appeals on April 16, 1941 (119 F. (2d) 231) on the Midamerica appeals, for which counsel were waiting as indicated by the Master's report, *supra.*

(j) The immediate preparation and filing of an application with the Court by Messrs. Leckie and Fogg as Supervisors and General Counsel of Subsidiary Debtor, asking specific authorization for the filing of the Ball suit which resulted in the granting of such authorization and of the appointment of them and of Mr. Sharp as Special Counsel to prosecute it. (R. 30 *et seq.*)

(k) The actual filing of complaint in such action on June 1, 1941, which was followed by intensive and extensive work in preparation for trial, coupled also, concurrently, with negotiations for settlement which ultimately resulted in an opportunity to compromise and settle the claim, which was duly presented to and approved by the Court on January 29, 1942 (R. 46), and which settlement petitioners, here, approved.

The Special Master and the District Court had personal knowledge of all of these multitudinous activities by Special Counsel (Respondents), which in planned logical sequence led up to the filing of the actions against the Ball interests and to the recovery. They also are reflected in the evidence offered at the hearings on their petition for compensation.

It, therefore, clearly appears that the findings of fact by the trial tribunals were not "clearly erroneous." In fact the findings clearly accorded with the weight of the evidence.

13. That the Securities Exchange Commission "recommended a maximum allowance to petitioners of $5,000.00 *and* their expenses." (9.)

Let the record speak for itself. We quote the statement (R. 58, 59) made by Mr. Ainsworth, attorney for the Securities Exchange Commission, at the hearing before the Special Master on the fee applications held on October 30, 1942:

> "Mr. Ainsworth: The Commission objects to an allowance on this application in the amount requested. We submit that the services involved were of no direct benefit to the Estate except to the possible extent that research or work done by these applicants in conducting their own independent litigation may have later been of some assistance to special counsel in connection with their assertion of the claim against the Ball interests. For any incidental value which the services may have in that sense we feel an allowance of $5,000, *including* expenses, would be an outside maximum. The applicants do not, as we understand it, claim to have participated in the litigation or negotiations which actually produced the Ball settlement. They base their claim, again, as we understand it, primarily on the theory or assumption that the assertion of claims by the subsidiary debtor against Ball was precipitated by their own efforts in obtaining the appointment of the Examiner, and that in the absence of such fraud special counsel for the debtor would either have failed or refused to assert claims against Ball. The Commission has not been a party to this proceeding during all of the period in question, but we have examined the application filed by these applicants and also the record of the entire proceeding, and we fail to find any substantial support for the assumption underlying that claim. On the contrary, the indications are, we feel, that the assertion of claim on the part of the subsidiary debtor against Ball was a logical aftermath of the Midamerica claim litigation. The Circuit Court, in its decision limiting the Midamerica claims to costs, established the impropriety

or invalidity of the Midamerica purchase, and strongly suggested the possibility that the debtor might be able to recover any profit realized on the part of any of the participants in Midamerica. We recognize that these applicants participated to some extent also in the Midamerica claim litigation, but their services in that connection have been the subject of an earlier application and that application has already been disposed of." (Emphasis ours.)

We do not consider this as *recommending* $5,000.00 or any other sum.

CONCLUSION.

No error of law is found in the judgment of the Circuit Court of Appeals.

Even if the contrary were true, such error would be inconsequential unless the factual findings of the Special Master and the District Court were set aside.

Such findings were not "clearly" or "plainly" erroneous. They were supported by ample evidence and accorded with the weight of the evidence.

Respondents believe that the compensation awarded them was merited. They are conscious of no moral obligation to share it with others whose activities have not been helpful.

Respectfully submitted,

FREDERICK L. LECKIE,

JOSEPH G. FOGG,

I. WALTER SHARP,

Respondents.